

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA :
 :
vs. : Case No. SA:19-CR-00063-DAE
 : San Antonio, Texas
HAE YEONG SONG(1), : July 21, 2021
Defendant. :

TRANSCRIPT OF NONJURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE DAVID A. EZRA
SENIOR UNITED STATES DISTRICT JUDGE

APPEARANCES:

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computer-aided transcription.

I N D E X**WITNESSES****PAGE****Special Agent Joshua Findley**

By Mr. Yuen

5

Jeffrey Stetler

By Mr. Yuen

10

1 (Wednesday, July 21, 2021, 9:13 a.m.)

2 * * *

3 COURT SECURITY OFFICER: All rise.

4 COURTROOM DEPUTY CLERK: SA:19-CR-00063, United States
5 of America versus Hae Yeong Song.

6 THE COURT: Okay. The Court would note the presence
7 of the defendant and the presence of counsel for the continuing
8 nonjury trial. All right. Does the government wish to call
9 its next witness?

10 MR. YUEN: Yes, Your Honor, but before we do so, there
11 are two points I'd like to address. One is, Your Honor, for
12 the government witnesses who have already testified and who the
13 government does not intend to ask to testify, may they be
14 allowed to be excused from the rule and witness the rest of the
15 proceedings or come and sit in the audience?

16 THE COURT: I don't have a problem with that. We
17 don't have a jury. Mr. Convery.

18 MR. CONVERY: I would have to know who is staying to
19 testify and who is leaving.

20 THE COURT: He said they're not intending to have them
21 testify, unless you intend to call some of them.

22 MR. CONVERY: In order to make that decision, out of
23 the remaining people, who do you intend to call?

24 MR. YUEN: We intend to call Special Agent Josh
25 Findley and Jeffrey Stetler.

1 MR. CONVERY: Okay. Then I have no concern with them
2 sitting in the courtroom.

3 THE COURT: All right. Yes.

4 MR. YUEN: Thank you, Your Honor. And then the second
5 thing is as a housekeeping matter, Government's Exhibits 10A
6 and 14A are excerpts of those Excel spreadsheets that are in
7 evidence as Exhibits 10 and 14 and we just want to make sure
8 that those excerpts are formally in evidence as well.

9 THE COURT: Did you move them in? I can't remember.

10 MS. RICHARDSON: I offered -- I talked about them and
11 offered them. I don't think I moved them to be asked to be
12 admitted.

13 THE COURT: So you're doing that now?

14 MS. RICHARDSON: Yes, please.

15 THE COURT: Any objection?

16 MR. CONVERY: Subject to my objection with respect
17 to --

18 THE COURT: They'll be received.

19 MR. YUEN: Thank you, Your Honor. If it please the
20 court, the government calls Joshua Findley.

21 COURTROOM DEPUTY CLERK: Please raise your right hand.

22 * * *

23 *(JOSHUA FINDLEY, Government Witness, Sworn.)*

24 * * *

25 THE WITNESS: I do.

1 COURTROOM DEPUTY CLERK: You can have a seat.

2 DIRECT EXAMINATION

3 BY MR. YUEN:

4 Q. Good morning, sir. Would you please state your name and
5 spell your last name for the record?

6 A. My name is Josh Findley, F-I-N-D-L-E-Y.

7 Q. Who do you work for, sir?

8 A. I'm employed by the Department of Homeland Security,
9 Homeland Security Investigations.

10 Q. What's your title there?

11 A. I'm a special agent.

12 Q. How long have you been with Homeland Security?

13 A. I've been with Homeland Security since 2004.

14 Q. What are your duties and responsibilities as a special
15 agent?

16 A. I'm a criminal investigator. Currently I'm assigned to a
17 child sexual exploitation group.

18 Q. How long have you been working on cases involving the
19 exploitation of children?

20 A. This -- including this job and my previous law enforcement
21 experience, probably around 23 years.

22 Q. What was your previous law enforcement experience?

23 A. I worked for the Treasury Inspector General and Army CID.

24 Q. Roughly how many child exploitation investigations have you
25 worked on?

1 A. I've been the primary case agent on probably over a hundred
2 cases and assisted on probably a thousand cases.

3 Q. Have some of those investigations involved the production
4 and receipt and possession of child pornography?

5 A. All of the above, sir.

6 Q. As part of those investigations, do you have to attempt to
7 determine the age of the suspected children in those
8 depictions?

9 A. Yes, sir.

10 Q. Have you ever heard the term series in relation to child
11 pornography?

12 A. Yes, sir.

13 Q. What's a series?

14 A. A series is a group of images or videos of a certain victim
15 or victims that have been traded on the Internet and sent to
16 the National Center for Missing and Exploited Children. They
17 group those by offenders and each series is given a different
18 nondescript name to go by.

19 Q. When you say a nondescript name, what do you mean?

20 A. Sometimes, you know, it will describe something in the
21 background or a bedspread or something like that. Sometimes it
22 will be a name that people on the Internet are calling it, but
23 they try to preclude using the suspect's name or the victim's
24 name in naming a series.

25 Q. I'd like to direct your attention to 2005. Were you

1 working child exploitation cases at that point?

2 A. Yes, sir.

3 Q. Are you familiar with a series of child pornography videos
4 and photographs that's known as the Vicki series?

5 A. Yes, sir, I am.

6 Q. How did you become familiar with that series?

7 A. I was the case agent on that case. There was a series of
8 videos that was being circulated on the Internet.

9 Investigators in Toronto, Canada had found clues in those
10 images and videos that led them to believe that the possible
11 victim in this case was located in the Pacific Northwest. They
12 reached out to me and I initiated an investigation to try to
13 find this victim and get her out of an abusive situation.

14 Q. Is it safe to assume that you were in the Pacific Northwest
15 at that time?

16 A. Yes, sir.

17 Q. You said that you were asked to identify that victim?

18 A. Yes, sir.

19 Q. Were you also asked to identify the -- well, let me back
20 up. Can you describe generally what the photographs and videos
21 in the Vicki series depict?

22 A. There's about 13 original videos that range in length from
23 ten to 20 minutes. Those videos depict a minor female being
24 anally sodomized, vaginally sodomized and oral sex both as the
25 passive and active recipient.

1 Q. And were you able to determine -- obviously you reviewed
2 those videos, correct?

3 A. Yes, sir.

4 Q. You said there was a child, female child in those videos?

5 A. Yes, sir.

6 Q. Who else was depicted in those videos?

7 A. One male subject.

8 Q. Were you asked to identify that male subject as well?

9 A. Yes, sir.

10 Q. Were you able to identify the child and the male?

11 A. Ultimately, yes, sir, we identified the victim and the
12 suspect in the case.

13 Q. Were you able to determine what, if any, relationship the
14 male had with the child?

15 A. Yes, sir, it was her biological father who had abused her
16 on his bi-monthly visits.

17 Q. Special Agent Findley, I'm going to show you -- I'm going
18 to ask you to look at what's in evidence as Government's
19 Exhibit 26A.

20 MR. YUEN: Your Honor, may I approach?

21 BY MR. YUEN:

22 Q. Special Agent Findley, do you recognize this?

23 A. Yes, sir.

24 Q. What do you recognize it to be?

25 A. This is a series of still images taken from a video which

1 shows the victim in the Vicki series performing oral sex on an
2 adult male.

3 Q. Based on your investigation, do you know how old the child
4 is in this video?

5 A. Yes, based on my investigation, she was ten and eleven
6 during the entire abusive time in her life, so she would have
7 had to either been ten or eleven in these photographs.

8 MR. YUEN: I'll pass the witness, Your Honor.

9 MR. CONVERY: No questions.

10 THE COURT: You can step down, sir.

11 THE WITNESS: Thank you.

12 MR. YUEN: Your Honor, the government calls Jeffrey
13 Stetler.

14 (9:22 a.m.)

15 COURTROOM DEPUTY CLERK: Please raise your right hand.

16 * * *

17 (JEFFREY STETLER, Government Witness, Sworn.)

18 * * *

19 THE WITNESS: I do.

20 COURTROOM DEPUTY CLERK: You can have a seat.

21 DIRECT EXAMINATION

22 BY MR. YUEN:

23 Q. Good morning, sir.

24 A. Good morning.

25 Q. Please state your name and spell your last name for the

1 record?

2 A. My name is Jeffrey Frederick Stetler. Last name is spelled
3 S-T-E-T-L-E-R.

4 Q. I understand that you're retired, sir?

5 A. I am. I retired June 30th.

6 Q. Congratulations.

7 A. Thank you.

8 Q. Where did you retire from?

9 A. I was a special agent with the FBI and retired out of the
10 Cleveland Division.

11 Q. How long were you a special agent with FBI?

12 A. Twenty-three years.

13 Q. How many years did you work cases involving child
14 exploitation?

15 A. My first child exploitation case was approximately 2007 and
16 I've worked them off and on from that time, mixed in with some
17 Indian country violations.

18 Q. Roughly how many investigations involving child
19 exploitation did you work on?

20 A. It's hard to quantify, I would say dozens.

21 Q. I'd like to direct your attention to 2013. Did you work
22 child exploitation cases during that timeframe?

23 A. Yes, I did.

24 Q. Are you familiar with a series of child pornography videos
25 and photographs known as the at-school series?

1 A. I am.

2 Q. How did you become familiar with that series?

3 A. That series or that case actually came to us as a lead from
4 some of our international partners from the Queensland Police
5 Department in Australia and the Dutch National Police. The
6 Australians had downloaded six videos from the Internet which
7 contained images of a prepubescent Hispanic female. In these
8 videos which were set in different locations, there were six of
9 them, in these videos set in different locations there was an
10 adult male, you could see his penis in hand, he was
11 masturbating, ultimately placing his penis in the child's mouth
12 and then ejaculating.

13 And then during the same time -- these were downloaded in
14 June and July of 2013. At the same time, the Dutch National
15 Police had downloaded three videos which were three of the six
16 that the Australians had downloaded. Both of these departments
17 had -- both sets of videos referenced a victim named Gina. One
18 of the videos the Dutch National Police downloaded was called
19 Gina Sucking It At School. Embedded in this video was GPS
20 coordinates that came back to the Belfair Elementary School in
21 Belfair, Washington, which was in our territory in the Olympia
22 resident agency of Seattle.

23 The Dutch National Police submitted that video and that
24 information to an Interpol working group which caused the
25 Australians to further analyze their videos. They submitted

1 this information to Interpol on the 19th of August, 2013. The
2 Australians looked at their images again to determine that two
3 of their six videos had GPS coordinates embedded. One of these
4 Gina Sucking It At School came back to the Belfair Elementary
5 School and the second video came back to a residence in San
6 Diego, California. This residence was determined to have been
7 the former residence of our subject, David Navarro. Open
8 source research conducted by the Australians determined that
9 David Navarro was now more likely than not living in the
10 Belfair area.

11 The Australians also found an e-mail address associated
12 with David Navarro. All of this information came to us, we
13 acted quickly, confirmed David Navarro's address in Belfair,
14 Washington. A subpoena to Yahoo confirmed that this e-mail
15 address associated with David Navarro was, in fact, registering
16 at an IP address in Belfair, Washington. Through DMV checks we
17 had confirmed his address. We did some open source social
18 media checks and it confirmed that David Navarro did, in fact,
19 have a daughter that appeared to be Gina from the videos
20 provided.

21 We took a sanitized version, sanitized picture from the
22 Gina At School video and showed it to the Belfair Elementary
23 School guidance counselor who confirmed our victim's identity
24 and age and that the video had, in fact, been shot at the
25 Belfair Elementary School. We were further advised that David

1 Navarro, our subject, was the president of the PTA and that the
2 video had more than likely than not been shot after a PTA
3 meeting. Because we had information that we believed this girl
4 was being actively victimized, we moved very quickly and
5 obtained arrest warrant for David Navarro on the 23rd of
6 August, two days before our victim's 8th birthday.

7 Q. I think you may have already answered my next question, but
8 were you able to determine the child's age?

9 A. Yes, we were. We know that our child victim was born on
10 August 25th, 2005 through, one, the guidance counselor, but
11 through birth records and through interviews of her mother.
12 And we arrested David Navarro two days before the 8th birthday.

13 (Pause.)

14 Q. Mr. Stetler, I'm going to show you -- I'm going to ask you
15 to take a look at two exhibits one at a time. The first is
16 going to be 22A. Do you recognize what's depicted in
17 Government's Exhibit 22A?

18 A. Yes, that is one of the six videos in the at-school series.

19 Q. Can you just describe for the record what that exhibit
20 depicts?

21 A. The actual video is Mr. Navarro masturbating, placing his
22 penis into the mouth of our victim and then ejaculating on her
23 face.

24 Q. And again, based on your investigation, how old is the
25 victim in this video?

1 A. This video I believe was either taken sometime between May
2 and June, possibly July of 2013, so she would have been no
3 older than seven years old.

4 Q. And then I'd ask you to take a look at Government's 33A.
5 And I'll ask you the same questions. Do you recognize this?

6 A. I do. This is another one of the at-school videos, one of
7 the six, and it depicts very much the same thing that I just
8 described in the previous video.

9 Q. And is the child's age more or less the same?

10 A. Yes.

11 MR. YUEN: I'll pass the witness, Your Honor.

12 MR. CONVERY: No questions.

13 THE COURT: No questions?

14 MR. CONVERY: No, sir.

15 THE COURT: You may step down, sir.

16 THE WITNESS: Thank you.

17 THE COURT: Ms. Richardson, do you have any additional
18 witnesses?

19 MS. RICHARDSON: We do not, Your Honor. At this time,
20 the United States rests.

21 THE COURT: All right. We don't have a jury to send
22 out, so if you'd like to make your motion, counsel, you can do
23 that now.

24 MR. CONVERY: Thank you, Your Honor. Your Honor, we
25 would move for judgment of acquittal in terms of the

1 government's failure to prove its case. I think the most
2 striking thing is the incomplete or lack of chain of custody.
3 I would point out to the Court that there are two exhibits in
4 question -- there was testimony that the Court will recall, but
5 3A and Six cannot be correct in the sense that 3A is the
6 envelope that the phone was put into. It's signed for by the
7 person who identifies himself on the Army form as the evidence
8 custodian. We learn through testimony that he attempted to
9 test the phone, that he used some device to test the phone, but
10 the Court knows nothing about that, nothing. No paperwork, no
11 report from the device, nothing to indicate and nothing on the
12 envelope itself, most importantly, to indicate that the phone
13 was removed from that envelope or put back during the time
14 period 22 January to 25 January.

15 The government or the clean-up or clear-up tends to
16 indicate that perhaps it was done after the Military Magistrate
17 authorized the seizure and the search, keeping in mind that the
18 seizure was, if you look at the form in terms of the Military
19 Magistrate, the seizure was hidden from the Military
20 Magistrate. The form itself on its face indicates that they
21 want to seize the phone. How can that be, one would ask in
22 good faith, when you told the neutral and detached Magistrate
23 that these are your reasons and you want to take the phone?
24 Not that you took it days ago. So going from there, you have
25 this search.

1 Now go to Mr. Cunningham, Agent Cunningham. Doesn't
2 indicate he got any records for his forensic examination about
3 whatever happened to the phone in that evidence room back at
4 Fort Sam Houston. We don't know and the Court doesn't know.
5 And it's critical because then when you go to Government's
6 Exhibit Number Six and you look at that chain of custody
7 document, just think of all the law that's gone before us in
8 terms of the importance of chain of custody, none of this is on
9 there. And that's fundamentally wrong and it's the
10 government's burden and the government's obligation.

11 We would reurge the motion to suppress on that basis
12 that became clear only at trial and that the government,
13 therefore, has not proved its case. Thank you.

14 THE COURT: Ms. Richardson.

15 MS. RICHARDSON: Your Honor, with regards -- first and
16 foremost, chain of custody goes to the weight of the evidence,
17 not the admissibility. But secondly and more importantly, the
18 very thing that Mr. Convery speaks of was discussed from the
19 witness stand. Special Agent Cerean talked about taking the
20 phone, putting it into the sealed envelope, he documented on
21 the form that he put it in the envelope, the testimony
22 discussed the fact that Kevin Strong on the installation
23 attempted an extraction of the phone, but was not successful.
24 Special Agent Cunningham discussed the fact that that's often
25 because of the level of licensing at the installation as

1 opposed to at a digital forensic examination location being
2 different and more successful there.

3 It is documented that Special Agent Cunningham took
4 the phone out of the envelope, did his work on that phone with
5 regards to the extraction and put the phone back into the
6 envelope. The evidence before the Court was extracted from
7 that phone. So the question with regards to custody is that
8 Where did the phone come from? We had the testimony of Special
9 Agent Cerean who testified the phone came from the defendant.
10 And then, What happened to the phone and whether or not any of
11 the evidence that was put before the Court had been altered or
12 changed in any way. And there is no evidence that anything was
13 changed. There is evidence that the local installation
14 attempted an extraction, attempted to conduct the search at the
15 location, but were unsuccessful. The phone was then
16 transferred to Fort Hood for a digital forensic examiner to
17 conduct the extraction and the analysis.

18 There's no evidence that would indicate that anything
19 happened to the phone that would change anything that was
20 within the phone. And the testimony clearly establishes where
21 that phone went and who touched that phone. There is, in fact,
22 extra documentation attached to the chain of custody and there
23 was witness -- there was testimony from the witness stand and,
24 in fact, Mr. Convery cross-examined the witnesses with regards
25 to the movement of the phone and the touching of the phone from

1 the time it was seized to the time that the examiner downloaded
2 it and began the analysis.

3 MR. CONVERY: I forgot, Your Honor, with that the
4 defense, of course, would close and rest.

5 THE COURT: Okay. Thank you, Mr. Convery.

6 MR. CONVERY: I didn't put that on the record. I
7 apologize.

8 THE COURT: Well, usually I do the defendant's motion
9 for judgment of acquittal before we hear from the defendant,
10 but I understand from your earlier pronouncements that you have
11 no witnesses. Is that right?

12 MR. CONVERY: Thank you, Your Honor. The defendant --

13 THE COURT: I have to query the defendant personally
14 about that before you close, actually.

15 MR. CONVERY: I understand.

16 THE COURT: So at this point, the Court of course must
17 look at the evidence in a light most favorable to the
18 government and the Court is absolutely satisfied with the chain
19 of custody with regard to the cell phone in this case. There
20 is absolutely not one shred of doubt in the Court's mind, let
21 alone beyond a reasonable doubt, that this phone was kept in an
22 undisturbed and pristine condition from its inception into the
23 hands of the agent until it was formally examined. I have no
24 concerns about that. Let me say that, this is not something
25 that I take lightly. I have in the past refused to allow

1 certain exhibits in evidence. In one case, it resulted in the
2 dismissal of the criminal charges because it was the only
3 evidence the government had where I had -- where there was a
4 need for the government to establish the custody of the items
5 that were to go into evidence and there was some real, genuine
6 concern on my part from the evidence that the particular
7 evidence in question, which was drug evidence, had, in fact,
8 been tampered with. And the government utterly failed to
9 provide me to any degree of certainty that that didn't occur.
10 And, in fact, there was very wishy-washy testimony about it
11 from one of the lab assistants and it later turned out that the
12 lab where they were tested had big problems. So I had
13 suppressed that, wouldn't allow it in and that was the right
14 thing to do in that case. So I'm not afraid to suppress
15 evidence and I've done it before in other instances.

16 In this case, there's no question about what
17 transpired with the phone, who had it, what was done with it.
18 It's all been clearly and well documented. Otherwise, I should
19 say that the evidence submitted by the government at this
20 point, looking at it in a light most favorable to the
21 government has clearly been enough by which the Court could
22 find beyond a reasonable doubt the defendant guilty of each and
23 every element of the indictment.

24 Now, my understanding is that the defendant has
25 decided he does not wish to testify. Am I right, Mr. Convery?

1 MR. CONVERY: You are correct, sir.

2 THE COURT: All right. So I need to have Mr. Song
3 stand up. And would you remove your mask for the purposes of
4 the reporter, Mr. Song?

5 You understand, Mr. Song, that you do have the right
6 to testify in your own defense?

7 THE DEFENDANT: Yes.

8 THE COURT: Okay. And you've been advised of that
9 both by the Court and by your attorneys, I am quite sure.

10 THE DEFENDANT: Yes.

11 THE COURT: All right. But you've also discussed that
12 you have the constitutional right not to testify, is that
13 right?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. Now, you know that your deciding
16 not to testify cannot and will not be used against you in any
17 way and the burden always remains upon the government to
18 establish your guilt beyond a reasonable doubt. You understand
19 that?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. Now, has anybody forced you,
22 coerced you or intimidated you into electing not to testify?

23 THE DEFENDANT: No.

24 THE COURT: Okay. So this is your own decision?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay. Now, your lawyers can advise you,
2 but you have to remember that the decision ultimately to
3 testify or not to testify remains your decision. You
4 understand that?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. And you still wish to exercise your
7 right not to testify?

8 THE DEFENDANT: Yes.

9 THE COURT: Okay. You can be seated. Thank you.

10 THE DEFENDANT: Thank you.

11 THE COURT: All right. Now, I must ask you, other
12 than your client who has decided not to testify, do you have
13 any additional witnesses or evidence you wish to put on?

14 MR. CONVERY: No, Your Honor. We would rest and
15 close.

16 THE COURT: Okay. And that means the government has
17 no rebuttal case, obviously. All right. Now, I didn't elect
18 to hear any opening statement because the Court absolutely
19 didn't need it. The Court is well aware of all of the facts
20 and circumstances. However, if counsel would like some closing
21 argument, I am more than happy to allow you to have closing
22 argument.

23 MS. RICHARDSON: The government is prepared to do so,
24 Your Honor.

25 THE COURT: All right. And that's the same for you as

1 well, Mr. Convery.

2 MR. CONVERY: Thank you, Your Honor.

3 THE COURT: Okay. You may proceed.

4 MS. RICHARDSON: Thank you, Your Honor. Your Honor,
5 you know that this case it starts, it rises and falls on
6 Government's Exhibit Three which was the cell phone that was
7 seized from the defendant as part of the ongoing investigation
8 that was already underway. That cell phone represents one of
9 the primary elements in this case required both for counts one
10 and count two and that is a facility of interstate commerce.

11 We move from that cell phone to the forensic
12 examination that was conducted by Special Agent Jeffrey
13 Cunningham wherein a number of tools produced an enormous
14 amount of evidence. First and foremost, that not only was that
15 beyond a reasonable doubt the defendant's phone because he had
16 it in his possession, it was his phone because he told the
17 agents, *I don't want you to take my phone*. We know it was his
18 phone because he told the agents, *I know there's a video on*
19 *that phone and I can show it to you*.

20 We also know from Government's Exhibit 15 where the
21 user accounts were identified through the forensic analysis and
22 the important fact, one of the most critical facts that we find
23 from Government's Exhibit 15, is the identification of Hae
24 Yeong Song as the user of a variety of accounts. Another very
25 important fact that we learned from the user accounts

1 identified in Government's Exhibit 15 is that the user is
2 identified as Soohyuk, S-O-O-H-Y-U-K.

3 We move from Government's Exhibit 15 to Government's
4 Exhibit 10. Government's Exhibit 10 and 10A provide the Court
5 with a foundation of the defendant's intent to not only receive
6 child pornography, but to possess child pornography. The web
7 history discussed in Government's Exhibit 10 and 10A show us
8 the variety of websites and searches conducted by the
9 defendant. Of importance is the highlighted portion on that
10 page of 10A which identifies the web activity for
11 Hush18.Tumbler.com.

12 That takes us to Government's Exhibit 11A wherein
13 there's a conversation recorded that involves Hush18.Tumbler.
14 That conversation is originally, not just translated, but
15 originally in Korean and in English. That conversation takes
16 place between 11/26/2017 and January 22nd, 2018. The
17 conversation, while we don't know who is on the other side, we
18 know that the device, Government's Exhibit Three, is in
19 communication and that that communication involves conversation
20 regarding the desire for pictures via the Internet and
21 inquiring on how do you get them.

22 We then move to Government's Exhibit 12A which further
23 emphasizes the knowledge and the intent of the user of
24 Government's Exhibit Three. In Government's Exhibit 12, we see
25 the translated conversation between Soohyuk, S-O-O-H-Y-U-K,

1 identified in the user accounts as the user for multiple
2 accounts having a conversation back and forth with Mr. Hush18.
3 That conversation begins on January the 19th, 2018 and goes
4 through January the 20th, 2018.

5 We move to Government's Exhibits 12B and 12C. These
6 are the -- at first look when you put all of those various
7 screen shots together as the Court pointed out at the beginning
8 of our trial yesterday, they first appear unrelated and without
9 context, but when you put the conversation around them, it
10 becomes very clear what those various screen shots are. They
11 are screen shots that are flowing in both directions between
12 the cell phone and Mr. Hush18. Those screen shots show
13 receipt, they show knowledge, they show intent, they show the
14 use of a computer. They show a facility of interstate
15 commerce. Those screen shots represent the conversation
16 between those two individuals negotiating quality and quantity
17 and length and specific specifications as to the victims in the
18 sexual assault materials that the defendant was seeking. He
19 was specific to race, he was specific to age and he was
20 specific in the quality that he wanted and the length of the
21 videos that he wanted.

22 At the end of that conversation, after the negotiation
23 goes back and forth -- and these screen shots represent the
24 ones coming from Mr. Hush18 represent Mr. Hush18's efforts to
25 show the defendant how to engage in business with him, how to

1 make payment by Paypal, Venmo, gift cards. He then sends him
2 examples of the gift cards that he could use. He also, at the
3 request of the defendant, sends a compilation of a variety of
4 samples of child pornography. Finally, the defendant sends him
5 money in exchange for videos. He receives the three zip files
6 within this conversation. The defendant opens those zip files,
7 he unzips them, extracts the videos and he sends back to
8 Mr. Hush18 the menu list of the videos he opened and looked at.

9 That takes us to Government's Exhibit 12 which shows
10 within all of Government's Exhibits 20 through 35, including
11 Exhibits 22, 26 and 33 that we heard about this morning, when
12 those zip files were transferred that takes care of our
13 receipt. When the defendant sends back the screen shot of all
14 of the videos that actually captured portions of those videos,
15 he was actually distributing back to Mr. Hush18 child
16 pornography.

17 When we go to --

18 MR. CONVERY: I have to object to raising 404(b)
19 evidence in a closing argument. I'm not exactly sure where we
20 go, but that's the reason for my objection. Can't just sit
21 here as defense counsel --

22 THE COURT: I thought she was referring to evidence
23 that's in.

24 MS. RICHARDSON: I am.

25 THE COURT: This isn't 404(b), this is actual evidence

1 that's in the record.

2 MR. CONVERY: It's uncharged misconduct, there was no
3 balancing test, there was nothing to suggest that she's now
4 saying that that itself was a crime. And I believe that's
5 inappropriate in closing.

6 THE COURT: I'll disregard it.

7 MS. RICHARDSON: When we look at Government's Exhibits
8 20 through 35, we know that there is knowledge of what he's
9 received because he's watched them. And we know that because
10 Government's Exhibits Three and Four provided us with the fact
11 that he saved those unzipped videos and images in multiple
12 places, on the cell phone as well as on the SD card. We also
13 have as evidence of his knowledge and of the possession the
14 evidence that was documented in Government's Exhibits 14 and
15 14A which are the VLC records showing which videos he used the
16 VLC media player to watch. And the videos that he watched all
17 included prepubescent children which is evident just by
18 watching them, but has also been supported by the testimony
19 from the witness stand this morning by two agents who are
20 personally familiar with those children. They all include
21 sexually explicit conduct involving all of the available forms
22 of sexually explicit conduct, sexual intercourse, anal
23 intercourse and oral, both as recipients and as being
24 perpetrated and being the perpetrator. It includes bestiality
25 and includes bondage. All of those videos were not just

1 watched, they were saved.

2 Probably, Your Honor, the most telling piece of
3 evidence can be found on page four of Government's Exhibit 12A
4 and that is the conversation wherein this is the incoming
5 portion of that conversation wherein Mr. Hush18 says,
6 *"Possessing these video footages in America? Should be*
7 *prohibited."*

8 Soohyuk, outgoing message, *"As long as one doesn't get*
9 *caught with it."*

10 Mr. Hush 18, *"I'll be in trouble if you're caught."*

11 Soohyuk, *"How? It's not connecting."* Soohyuk to
12 Mr. Hush18, *"You're in Korea, you won't get caught."*

13 Mr. Hush18 to the defendant, *"Can you send it to a*
14 *bank account from there?"*

15 He knew exactly what he was doing because it was
16 exactly what he intended.

17 THE COURT: What I'm interested in you focusing on for
18 a moment, Ms. Richardson, is the evidence in the record of him
19 actually distributing the child pornography.

20 MS. RICHARDSON: So from his -- well, he hasn't been
21 charged with distribution.

22 THE COURT: Well, he's been charged --

23 MS. RICHARDSON: With receipt.

24 THE COURT: Yes, I'm sorry, receipt. That's right.

25 MS. RICHARDSON: The receipt is fully documented by

1 the three zip files that are transferred from Mr. Hush18 on
2 that specific date, arriving to his phone and the knowledge of
3 what's in those zip files is documented when he opens those zip
4 files, he views the images.

5 THE COURT: That's right, that's right. I was looking
6 at count two and I in looking at count two, you're right,
7 that's just possession, that isn't distribution because I
8 didn't see much evidence here of distribution.

9 MS. RICHARDSON: No, and the only reason I mentioned
10 it, and I obviously would not have mentioned it in front of a
11 jury, is to show his --

12 THE COURT: Well, that was why I was asking you about
13 it because you were talking about him sending stuff back and
14 I'm looking here to see where is the distribution because it
15 isn't here and it isn't in the charges.

16 MS. RICHARDSON: Correct. No, he's not charged with
17 distribution, he's charged with receipt. The screen shot back
18 to Mr. Hush18 was to confirm what he had received and opened.

19 THE COURT: Well, he's actually charged with
20 possession in one count and receipt in the other.

21 MS. RICHARDSON: That's correct. That's correct, Your
22 Honor. The government is confident they've proved each and
23 every element for both count one, receipt of child pornography,
24 as well as count two, possession for child pornography and we
25 would ask that the Court find the defendant guilty.

1 THE COURT: Counsel, I've actually already heard a
2 good part, I think, of your closing argument. If you wish to
3 give some more, I'm happy to have it.

4 MR. CONVERY: You have heard my closing argument. For
5 the defense, it's apparent to the Court, I think, that this
6 case revolves around the motion to suppress.

7 THE COURT: That's right.

8 MR. CONVERY: And now the issue of the chain of
9 custody. In terms of the evidence, it's somewhat of a
10 circumstantial case in that it's based on it being his device.
11 There's not a wit of testimony from any friend, roommate,
12 anyone else that's ever seen --

13 THE COURT: I would absolutely agree with you that
14 without -- because I don't believe that he confessed. I don't
15 have -- we don't have any confession, so if there's no cell
16 phone, there's no case.

17 MR. CONVERY: Correct. And in terms of the possession
18 versus the receipt, that's the decision that the Court has to
19 wrestle with in any two-count case where the facts are somewhat
20 inextricably intertwined. But with respect to where we're at,
21 the analysis of the Court in terms of the motion to suppress,
22 and with that I would have no additional closing argument.
23 Thank you.

24 THE COURT: I think the parties are well aware that
25 the Court is quite knowledgeable on the background of this case

1 and the facts because we did essentially have a mini trial on
2 the issue of suppression. And now, which was I think almost as
3 long as this one and that's all in the record. And the Court,
4 of course, has heard the testimony today -- not today, but some
5 today, yesterday as well, in some greater detail and the Court
6 did verify for itself and there was no contention on the part
7 of the defense that these files did not constitute child
8 pornography under any definition of it, but in particular under
9 the definition which is outlined, which consists of any visual
10 depiction including any photograph, film, video, picture or
11 computer or computer-generated image or picture whether made or
12 produced by electronic, mechanical or other means of sexually
13 explicit conduct where, (A) the production of the visual
14 depiction involves the use of minor engaging in sexually
15 explicit conduct. Such visual depiction is a digital image,
16 computer image or computer-generated image that is or is
17 indistinguishable from that of a minor engaging in sexually
18 explicit conduct. Such visual depiction has been created,
19 adapted or modified to appear that the identifiable minor is
20 engaging in sexually explicit conduct. That's from 18 U.S.C.
21 2556.

22 And a computer includes any electronic, magnetic,
23 optical, electromechanical or other high-speed data processing
24 device performing logical, arithmetic or storage functions and
25 includes any data storage facility or communications facility

1 directly related to or operating in conjunction with such
2 device, but such term does not include an automated typewriter
3 or typesetter or portable handheld calculator or other similar
4 device. And that is 18 U.S.C. 1030(e)(1).

5 I don't know of any court that has not found that a
6 modern cell phone such as the one that's in evidence in this
7 case is anything other than a computer for purposes of the
8 statute.

9 Now, looking at count one, receipt of child
10 pornography, the elements are four, any person -- and of course
11 the defendant is a person -- who knowingly receives or
12 distributes. And that's where the confusion was because this
13 statute does include "distributes", but you're not trying to
14 make a distribution case here. Who knowingly receives -- and
15 the evidence establishes beyond a reasonable doubt that the
16 defendant did, in fact, receive knowingly child pornography --
17 any child pornography or any material that contains child
18 pornography. This Court has received and has viewed the
19 material in evidence. It does clearly and without question
20 contain images and videos of child pornography. We often have
21 a problem because there are some -- and I've presided over I
22 can't even begin to think how many of these child pornography
23 cases. Adult websites will occasionally have images of 19 and
24 20-year-olds dressed -- who are very young looking dressed as
25 children. And of course, that does not constitute what we have

1 in this case. And there's a big debate over whether that's
2 child pornography or it isn't and I believe that the latest
3 rulings are that it isn't. And I've had some evidence
4 submitted to the Court by other government prosecutors where
5 you could not when you looked at the evidence because -- and I
6 don't know how to put this in an appropriate way in this day
7 and age, but I have to say it, these young women were, if I
8 could say this, quite well developed physically. I don't know
9 of any less offensive way of putting it. So that you could not
10 tell when you looked at those images. And the government's
11 prosecutor actually agreed and withdrew those images because
12 she had not actually focused on those images, but you could not
13 tell whether that person was 15 or 22, to be honest with you.

14 That is not the case with these images. These are in
15 many instances children that are clearly -- if they're 12 years
16 old, that would be a stretch. Many of them are almost infants.
17 They're very, very young, two to three years old in the main.
18 The activities described in these videos are largely as
19 described by the prosecutor. I am sorry to say that some of
20 these videos included, as she said, bestiality, a dog
21 interacting with a child, a farm animal interacting with a
22 child. And these videos were absolutely, clearly and
23 unequivocally beyond any doubt at all child pornography. There
24 is no doubt about it. And anyone who views it will see within
25 the first few frames that this is child pornography. So that

1 is covered.

2 And finally, number four, any means or facility of
3 interstate or foreign commerce or that has been mailed or
4 shipped or transported in or affecting interstate or foreign
5 commerce by any means including by computer. There is clear
6 and unequivocal evidence that that occurred in this case. So
7 the Court finds that the government has proven beyond a
8 reasonable doubt each and every element of count one and the
9 defendant is hereby found guilty of count one.

10 Moving to count two, possession of child pornography
11 pursuant to 18 U.S.C. 2252A(a)5(B), again we have any person,
12 and of course the defendant is a person, knowingly possesses or
13 knowingly accesses with intent to view -- and we have clear
14 evidence through the forensic examination of the cell phone
15 which was his, that that did occur -- any book, magazine,
16 periodical, film, video tape, computer disk or any other
17 material, (A) that contains an image of child pornography that
18 has been mailed or shipped or transported using any means or
19 facility of interstate or foreign commerce entered to affecting
20 interstate or foreign commerce by any means, including by
21 computer. The evidence shows beyond a reasonable doubt that
22 3(a) (i) has been satisfied and that was produced using
23 materials that have been mailed or shipped or transported in or
24 affecting interstate or foreign commerce by any means including
25 a computer and that has also been satisfied beyond a reasonable

1 doubt.

2 So the Court finds the defendant guilty of count two
3 beyond a reasonable doubt.

4 Now, I agree with defense counsel, if a defendant
5 unconditionally pleads to an indictment, they have
6 unequivocally and irretrievably waived -- I mean assuming that
7 that plea stands, they weren't coerced into it -- unequivocally
8 and irretrievably waived any right to challenge evidence that
9 had been suppressed by the Court. They've waived it. In this
10 case, the defendant has not waived his right to appeal. I'm
11 not going to give his appellate rights because he hasn't been
12 sentenced yet, I do that after sentencing. But the defendant
13 has not waived his right to appeal. That can be done -- a
14 person can plead guilty with a reservation of right to appeal,
15 we call that a conditional plea. That did not happen in this
16 case. Why? I have no idea, but it didn't. And I think both
17 counsel would agree that this Court has not in any way involved
18 itself in any plea negotiations or tried to attempt or coerce
19 anybody into pleading in this case. Would you both agree with
20 that?

21 MS. RICHARDSON: The government agrees, Your Honor.

22 MR. CONVERY: The defense absolutely agrees with that.

23 THE COURT: So if the defendant had his right to a
24 trial, he waived a jury trial, he did waive the right to a
25 findings of fact and conclusions of law, which in this case

1 would have been proforma and to be honest with you would have
2 just delayed things, and so the real issue in this case is
3 whether the Court made the correct judgment in denying the
4 motion to suppress. I am quite sure that Mr. Convery and his
5 co-counsel will make a vigorous argument on behalf of the
6 defendant in that regard and that's their duty. That's their
7 responsibility to their client.

8 As I've said many, many times, I've been very
9 privileged to have sat by designation on the Ninth Circuit
10 Court of Appeals for over 30 years. I hold the record for the
11 most designated sittings and I'm very proud of that because it
12 means a bunch of judges asked me back and it's because they
13 know that I believe in the appellate process. And we've got a
14 very good Appeals Court here in our Fifth Circuit. They will
15 look at this dispassionately as I always try to do and they
16 will make a decision on these facts as to whether or not this
17 evidence should have been suppressed in whole or in part. And
18 I will respect that decision regardless of what it is. And
19 that's the way our system works, just like when I sit on the
20 Court of Appeals, and I'm right in the midst of almost ready to
21 file a published opinion in a very important case that I have
22 authored and that's the way it is. I mean, that's the way the
23 system works and I wholly believe in it.

24 So I think that lawyers -- Mr. Convery and I and
25 Ms. Richardson and I have known each other and his co-counsel

1 long enough to know that I never hold it against a lawyer who
2 appeals anything that I do. I understand that there is some
3 concern by some lawyers that judges do and there probably are
4 some judges who do hold it against them. I don't. I believe
5 in that process.

6 And in fact, one of my very best friends is a retired
7 Naval officer who was the Attorney General in Hawaii. Now, I
8 was affirmed in the vast majority of cases he appealed, but he
9 was successful in getting me reversed in a case and I admired
10 him for his good work in that case and he and I are dear, dear
11 friends today. And I joke about it all the time. I tell him
12 he's the only -- he can hold it over me that he got me reversed
13 in this case. He said, Yeah, but you forget the other cases.
14 Yeah, fine guy. Author, actually wrote -- his name was Michael
15 Lilly and he wrote a book about Admiral Nimitz, who we both
16 know Admiral Nimitz grew up right up here in Fredericksburg and
17 we have his home here in Fredericksburg. And Admiral Nimitz
18 during his time in the Pacific in World War II stayed with the
19 Lilly family and he wrote about that time. It's called Nimitz
20 At Ease. It's a very good book if you haven't had a chance to
21 read it.

22 So we need to set a date for the defendant's
23 sentencing. Is he still in the United States Army?

24 MR. CONVERY: No, sir.

25 THE COURT: He's been discharged?

1 MR. CONVERY: Yes, sir.

2 THE COURT: Of his own volition or did they --

3 MR. CONVERY: Through an administrative proceeding.

4 THE COURT: And what kind of a discharge did they give
5 him?

6 MR. CONVERY: I believe the UOTH, under other than
7 honorable.

8 THE COURT: They didn't give him a dishonorable
9 discharge?

10 MR. CONVERY: No, sir.

11 THE COURT: Other than under honorable conditions.

12 MR. CONVERY: He administrative discharged under other
13 than honorable. Sorry to use the acronym.

14 THE COURT: Well, you're closer in time to your active
15 service than I am.

16 Sentencing will be November 1st of 2021, at 9:00 a.m.
17 Now, where is he living? Where is he residing now?

18 MS. RICHARDSON: Your Honor, the government would ask
19 that he be taken into custody pursuant to 18 U.S.C. 3143, it's
20 statutorily mandatory.

21 THE COURT: I think that's right, unfortunately. I
22 don't think he's a flight risk, he hasn't gone anywhere. He's
23 done everything he's supposed to do. Are you sure it's
24 absolutely mandatory?

25 MS. RICHARDSON: 3143 says, "*The judicial officer*

1 *shall order that a person who has been found guilty of an*
2 *offense in a case described in sub paragraphs A, B or C of*
3 *subsection F(1) and is awaiting imposition or execution of*
4 *sentence be detained."*

5 THE COURT: Doesn't give me much leeway.

6 MR. CONVERY: None at all, Your Honor. And you know,
7 the defense will take a look at that, but that's been -- I
8 think she's actually --

9 THE COURT: I have had these cases where government's
10 counsel just stood up and said we have no objection to their
11 remaining out. And I guess we've never looked at it that
12 carefully. I don't think he's either -- if he was going to be
13 a flight risk or try to run back to Korea or something -- where
14 was he born?

15 MR. CONVERY: He was born in Korea. He lives in
16 Columbia, Maryland.

17 THE COURT: But I think that actually we have an
18 extradition treaty with Korea.

19 MR. CONVERY: Throughout this time, I might add,
20 throughout the pandemic he's been at home under very
21 restrictive conditions which we can talk about more at
22 sentencing, but there's just been not a single problem. He's
23 paid his way back and forth. I agree with you that the
24 government -- it's been my experience also that at times they
25 have not exercised that statute. I think in terms of this

1 prosecutor exercising it, well, that's their discretion. I
2 can't do anything about it.

3 THE COURT: I don't mean to suggest that I have any
4 sympathy for child pornography or anybody that's engaged in it.
5 My only concern is whether somebody is going to show up or
6 they're not going to show up and I have no doubt that he is
7 going to show up. But that aside, since the government has
8 brought to the Court's attention their desire that he be held
9 in custody and the statute appears to require it, the fact that
10 other government prosecutors have not at times asked the Court
11 to enforce that doesn't mean that when it is being placed
12 before the Court that I can ignore my responsibility to enforce
13 the law and I won't.

14 So it is the judgment of the Court that the defendant
15 is hereby committed to the custody of the United States
16 Marshals for the Western District of Texas to be held pending
17 sentence at an appropriate facility, either a facility
18 contracted by the Marshals Service or a facility owned and
19 operated by the Bureau of Prisons. Okay. And you got that?
20 November 1st of '21, at 9:00 a.m.

21 MR. CONVERY: November 1st at 9:00 a.m.

22 THE COURT: Right. We can move that if we have to for
23 some reason. Sometimes people get involved in things or I
24 might be in Austin in the middle of a trial or something, but
25 we can move it a few days, but we'll try not to do that.

1 MR. CONVERY: Your Honor, I don't think we have any
2 Marshals in the courtroom, which is not a problem at all --

3 THE COURT: There is.

4 MR. CONVERY: Okay, good. I've got some clothing to
5 switch out and I'll make that administrative issue.

6 THE COURT: Thank you.

7 COURT SECURITY OFFICER: All rise.

8 THE COURT: I thank you all very much. If there's
9 anything that you need to talk to -- counsel needs to talk to
10 me about following this, just talk among yourselves and I'll be
11 happy to. I don't see that there is or if there is an issue
12 later that you need to reach me and we need to discuss, just
13 get together and we can do a joint telephone call.

14 MS. RICHARDSON: Thank you, Your Honor.

15 THE COURT: Court stands in recess.

16 (10:18 a.m.)

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date signed: January 28, 2022

/s/ Angela M. Hailey

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